Criminal Appeal (S.J) No.992 of 2005
with
Criminal Appeal (S.J) No.1031 of 2005

Against the Judgment of conviction and order of sentence dated 26.07.2005 passed by the Special Judge, C.B.I. Ranchi in R.C.No.15(A) of 2002 (R).

Kailash Paswan…….. Appellant [Cr.App.(S.J) No.992 of 2005]
Mohan Nayak…….. Appellant [Cr.App.(S.J) No.1031 of 2005]

V E R S U S

State of Jharkhand through C.B.I……Respondent

For the Appellants :M/s.S.K.Murari, Rajan Raj & Jitendra Nath
For the C. B. I : Mr.M.Khan

P R E S E N T
THE HON'BLE MR. JUSTICE R. R. PRASAD

Reserved on 14.06.2013 *Delivered on 13.03.2014*

R.R.Pd., J. Both the criminal appeals arising out of the same judgment were heard together and are being disposed of by this common judgment.

The aforesaid two appeals are directed against the judgment of conviction and order of sentence dated 26.7.2005 passed in R.C. No. 15(A) of 2002 (R) whereby both the appellants were found guilty for the offences under Section 7 of the Prevention of Corruption Act read with Section 120(B) of the Indian Penal Code and also under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and each of the appellant was sentenced to undergo rigorous imprisonment for 1 and ½ years under Section 7 of the Prevention of Corruption Act read with Section 120(B) of the Indian Penal Code and to pay a fine of Rs.4000/- with default clause.Further they were sentenced to undergo rigorous imprisonment for 2 and ½ years under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and to pay a fine of Rs.6000/- with default clause.

The case of the prosecution is that the complainant, Khaliluddin (P.W.7) had retired in September, 2001 as Mechanical Fitter from Bhurkunda Colliery, a unit of Central Coalfield Limited. Since then, the matter relating to CMPF refund was pending at CMPF office, Ranchi. On 12.11.2002, the complainant met with the appellants, Kailash Paswan and Mohan Naik, both Upper Division Clerks, CMPF in their office at about 10 A.M. Both of them asked the complainant to pay Rs.1000/- as bribe so that CMPF refund be paid to him. In such eventuality, the complainant, Khaliluddin (P.W.7) filed a complaint (Ext.11) before the In-charge, S.P., C.B.I/S.P., Ranchi The then In-charge S.P., C.B.I directed S.N.Choudhary (P.W.8) to make verification of the allegation made by the complainant. The allegation on being verified, was found prima facie to be true and hence, he submitted verification report (Ext.12) to that effect. On submission of the verification report, an FIR was lodged (Ext.13) against both the appellants. The Inspector, K.K.Singh (P.W.9) took up the investigation. The then S.P., In-charge constituted a team consisting of K.K.Singh, Inspector (P.W.9), S.N.Choudhary (P.W.8), Bikash Gupta, Inspector, R.S.Solanki, Sub-Inspector and two constables as well as two independent witnesses, Binod Kumar Birua (P.W.5) the Deputy Manager and Khurshid Alam, Assistant Manager (P.W.4), S.B.I, Ranchi. Thereafter pre-trap exercises were undertaken whereby the witnesses were told about the characteristics of Phenolphthalein powder. Currency notes amounting to Rs.1000/- of the denomination of Rs.50/- produced by the complainant were treated with Phenolphthalein powder and were given back to the complainant. P.W.4, Khurshid Alam, independent witness was asked to accompany the complainant to the CMPF office. Accordingly, a pre-trap memorandum (Ext.14) was prepared. Thereafter trap team left the place and proceeded to CMPF office where they reached at 13.20 hours. The complainant (P.W.7) was asked to approach the accused persons who were found sitting in their office. The independent witness (P.W.4) was asked to accompany

the complainant. Thereafter the complainant along with Khurshid Alam proceeded towards accused persons. Other members of the trap team including the independent witness, B.K.Birua (P.W.5) took suitable positions near entrance of the hall from where they could see the happenings. When the accused persons came near the table of the appellant, Mohan Nayak, he asked the complainant to sit over the chair placed across the table of the appellant, Mohan Nayak. The complainant as well as independent witness Khurshid Alam (P.W.4) sat on the chair. Thereupon the appellant, Kailash Paswan asked the complainant as to whether he has brought the money. When the complainant answered in positive, the appellant, Kailash Paswan asked the complainant to pay the money to Mohan Nayak. At the same time, the appellant, Kailash Paswan also instructed Mohan Nayak to accept the money. Accordingly, the complainant, Khaliluddin took out the money which had been treated with Phenolphthalein powder and gave it to Mohan Nayak who by extending his right hand accepted it and counted it with both hands and then passed on ten currency notes each of denomination of Rs.50/- amounting to Rs.500/- to the appellant, Kailash Paswan. He after receiving the money, counted it with both hands. All these happened in presence of an independent witness, Khurshid Alam (P.W.4). Other independent witness, Binod Kumar Birua, who was standing near the entrance of the said hall also saw the complainant giving money to the appellants which was accepted by them. After the money was received by the appellants they told the complainant that they will be doing needful so that refund be made to him. Meanwhile, the complainant gave pre-fixed signal. On seeing signal, K.K.Singh (P.W.9) along with members of the team including the independent witness, Binod Kumar Birua came near the appellants by rushing. The Investigating Officer (P.W.9) K.K.Singh challenged both of them, as a result of which, both of them became nervous. Thereupon money Ext IX to IX/19 was recovered from each of them. Thereafter hand wash of both the hands of each of

the appellants was taken which on treatment got pink. Upon all formalities being completed, post trap memorandum (Ext.15) was prepared. Thereafter I.O (P.W.9) seized refund file under the seizure list.

On completion of investigation and on procuring order sanctioning prosecution (Ext.7), charge sheet was submitted, upon which cognizance of the offence was taken against both the appellants.

In course of time, the appellants were put on trial. During which, the prosecution examined as many as nine witnesses. Of them, complainant (P.W.7) did not support the case fully as had been made out in his written report (Ext.11) submitted before the S.P., C.B.I. In the said complaint (Ext.11) statement had been made to the effect that both the appellants had demanded money but in his evidence he did depose that the money had been demanded only by the appellant, Mohan Nayak. He has gone to say that Kailash Paswan had never put forth any demand. In such situation, P.W.7 has been declared hostile. However, P.W.4, Khurshid Alam, an independent witness has testified that in course of pre-trap exercises the complainant had stated that both the appellants had been demanding money. Further he has deposed that after a trap was arranged, trap team came to the office of CMPF. There he along with the complainant came to the appellants. Upon it, the appellant, Kailash Paswan asked from the complainant as to whether he has arranged money. When the complainant answered in positive, he asked the complainant to hand over the money to the appellant, Mohan Nayak. Accordingly, the money was given to Mohan Nayak, who counted it and then Rs.500/- was passed on to Kailash Paswan. Thereupon Mohan Nayak told the complainant that now payment would be made to him. At the same time, Kailash Paswan also told to the complainant that when the file will come to him, he will be doing needful so that payment would be made to him. Thereafter when signal was given, K.K.Singh, I.O along with other

members of the trap team reached over there and recovered tainted money from both of them.

More or less, similar is the testimony of another independent witness, Binod Kumar Birua (P.W.5) who has testified that while Khurshid Alam, P.W.4 had accompanied the complainant to the accused persons, he remained standing near the door of the hall. On seeing the complainant, the appellant Kailash Paswan asked him as to whether he has brought the money. When he answered in positive, the appellant Kailash Paswan asked the complainant to hand over it to Mohan Nayak. Accordingly, it was given to Mohan Nayak who after counting the money passed on ten currency notes each of denomination of Rs.50/- to Kailash Paswan and then Kailash Paswan told the complainant that now the payment would be made. According to him also tainted money had been recovered from both of them. P.W.8, one of the members of the trap team though has testified that he never heard conversation took place in between the complainant and the accused persons but he has spoken about the recovery of the money from both the persons. Similar is the testimony of P.W.9, I.O. On such evidences, the trial court did record that though the complainant, Khalluddin (P.W.7) has not supported the case that money had been demanded by the appellant, Kailash Paswan and had received it but from the evidence of other witnesses including the independent witness, it gets established that both the appellants had demanded and accepted the money which further gets strengthened from the fact that tainted money had been recovered from the possession of both the appellants.

Having come to such conclusion, learned trial court found both the appellants guilty of the charges and accordingly, passed order of conviction and sentence.

Mr.S.K.Murari, learned counsel appearing for the appellant, Kailash Paswan would submit that one Phahim Alam, Upper Division Clerk had been dealing with the matter relating to refund of the CMPF

claim. He had given charge of the file at about 1.05 P.M. on 12.11.2002 and therefore, question of putting forth illegal demand on 10 A.M. on 12.11.2002 does not arise and that from perusal of refund claim file (Ext.5), it would appear that the matter had been dealt with Phahim Alam (P.W.1).

Further it was submitted that according to the evidence of the complainant, P.W.7 illegal demand had been made only by the co-convict Mohan Nayak and when the money was paid to him, he, according to the evidence of P.W.7, deliberately pushed it towards the appellant, despite opposition of the appellant. He has categorically deposed that the appellant had never put forth any demand.

Further it was submitted that other independent witness, particularly P.W.5 though has claimed to have heard conversation and saw act of passing of money by the complainant to the accused persons but his testimony gets falsified from the evidence of P.W.4 who in his cross-examination has stated that rest of the members of the trap team had stayed down stair.

Thus, under the circumstances, it can be said that the prosecution has failed to establish the fact that the appellant had ever put forth demand of illegal money from the complainant and thereby the court committed illegality in recording judgment of conviction and order of sentence against the appellant.

Learned counsel appearing for the appellant, Mohan Nayak submits that admittedly refund file was not dealt with by this appellant, rather as per the evidence of P.W.1, charge of the file had been given to Kailash Paswan and therefore, there was no occasion for this appellant to ask for illegal demand from the complainant.

Further it was submitted that though P.W.7 has deposed in his evidence that this appellant had demanded money and had also accepted the bribe but his evidence gets falsified from the evidence of P.W.4,Khurshid Alam, who has testified that when he along with the complainant approached Kailash Paswan in his office, it was Kailash

Paswan who asked from the complainant as to whether he had brought money and when answer was given in positive, Kailash Paswan asked the complainant to hand over the money to this appellant. Similar is the testimony of P.W.5. Thus, the evidence of the complainant on one hand and the evidence of other two witnesses on the other hand are contradictory to each other.

Thus, it was submitted that it is evident that the evidence of the complainant, P.W.7 is never inconsistent with the evidences of P.Ws.4 and 5 and thereby the prosecution can be said to have failed to prove the charges beyond any reasonable doubt and hence, the order of conviction and sentence is fit to be set aside.

As against this, Mr. Khan, learned counsel appearing for the C.B.I submits that the prosecution has undoubtedly established the factum of recovery of tainted money from both the appellants. On the point of recovery, the appellant has not been able to explain as to how the tainted money has been recovered from their possession.

Further it was submitted that even if the complainant has turned hostile, his evidence cannot be discarded in totality, rather that apart of the evidence which is worth acceptable can be relied upon.

In such situation, the testimony of P.W.7 to the effect that Mohan Nayak had made demand of illegal gratification is worth acceptable as this version is corroborated by the statement made in the complaint (Ext.11).

Under the circumstances, the prosecution can be said to have proved its case against Mohan Nayak beyond any reasonable doubt.

So far the appellant, Kailash Paswan is concerned, he seems to have been let off by the complainant though specific statement of the complainant is there in the complaint petition to the effect that both the appellants had put forth demand. However, that part of putting forth demand of illegal gratification made by Kailash Paswan gets proved from the evidence of independent witnesses, P.Ws.4 and 5. Therefore, taking into account the evidences regarding demand made

by this appellant coupled with the fact that tainted money had been recovered from the possession of this appellant also the prosecution can be said to have proved its case beyond all reasonable doubt and thereby the judgment of conviction and order of sentence never warrants to be set aside.

Coming to the case of the prosecution as has been made initially by the complainant in his written complaint (Ext.11), both the appellants had made demand of illegal gratification. Upon the complaint made before the S.P, C.B.I, a case was registered. Thereupon trap was arranged. In that course, when the complainant (P.W.7) along with the shadow witness, P.W.4, Khurshid Alam came to the appellant, Kailash Paswan, Kailash Paswan on seeing him asked as to whether money has been arranged. When the answer was given in affirmative, the appellant asked the complainant, P.W.7 to hand over the money to the appellant, Mohan Nayak. Rs.1000/- was given to him. He counted and then Rs.500/- was passed on to Kailash Paswan. By that time, other members of the trap team, P.W.5, P.W.8 and also the Investigating Officer, P.W.9 reached over there and then tainted money was recovered from both of them and the money was seized over which Phenolphthalein test was conducted which showed positive result. This fact has been established beyond all reasonable doubt as witnesses, such as, P.W.4, P.W.5,, P.W.8 and P.W.9 are consistent on this point.

However, the submission which was advanced on behalf of the appellant, Kailash Paswan is that mere recovery of money is not enough to hold the person guilty as demand and also the recovery is sine qua non for establishing the case under Section 13(i)(d) read with Section 13(2) of the Prevention of Corruption Act.

In the context of the submission, one needs to examine as to whether the prosecution has proved the factum of demand against both the appellants or not ?

I have already indicated that initially the case which had been

made by the complainant in his complaint (Ext.11) is that both the appellants had put forth the demand. However, the complainant (P.W.7) in his evidence has never deposed that the appellant, Kailash Paswan had ever put forth the demand. He has also not supported his earlier version that recovery had also been made from the appellant, Kailash Paswan. Perhaps that is the reason why the prosecution has declared him hostile. Ignoring the evidence of P.W.7 so far this appellant is concerned but not in the context of the case of the other appellant still the prosecution seems to have established his case that this appellant had put forth the demand. In this connection, evidence of P.W.4, shadow witness be referred to, who had accompanied the complainant to the appellant, when the complainant came to the appellant, Kailash Paswan, who on seeing complainant asked whether the money has been arranged. When the complainant answered in positive, he asked the complainant to give it to the appellant, Mohan Nayak. The testimony of P.W.4 gets corroboration from the testimony of P.W.5, another shadow witness, who though had not accompanied the complainant when the complainant approached the appellant but he was standing near the door of the hall from where he can hear conversation and see the happenings. He has also testified that when the complainant came to the appellant, Kailash Paswan, he asked as to whether money has been arranged. There has been no reason as to why the testimony of these two witnesses though they are the shadow witnesses be not accepted. It is true that those two witnesses have been made members of the trap team at the instance of the police but that itself does not make any dent to his status of being independent witness. Both the persons were working in the Bank and as such, they were never dependent upon the police.

Under the circumstances, there has been no hesitation to accept the testimonies of these two witnesses relating to factum of demand. Thus, in my opinion, the prosecution has been able to establish that this appellant had also put forth the demand of illegal

gratification. Submission has also been advanced to the effect that on that day itself, he had taken charge and therefore, there was no occasion for him to put for forth the demand from the complainant at 10 O'Clock. Since the finding is not based on this aspect of the matter, rather it is based on the factum of demand made later on. I need not to go into that question.

So far the appellant, Mohan Nayak is concerned, the complainant, P.W.7 in his testimony by making deviation from his earlier statement has testified that demand had been made by this appellant. In that event, the submission was advanced to the effect that his testimony is not worth reliable.

Under the circumstances, question does arise as to whether that part of the testimony of P.W.7, who has been declared hostile by the prosecution, could be availed by the prosecution, which is in consonance with the statement made earlier.

More or less similar question fell for consideration before the Hon'ble Supreme Court in a case of ***Sat Paul vs. Delhi Administration (AIR 1976 SC 294)*** wherein their Lordships after taking into account several decisions did hold hereunder:

> "From the above conspectus, it emerges clear *that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence of the record, that part of his testimony which he finds to be credit worthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto.*"

Thus, it has been held that even in a case of hostile witness that part of the testimony which the court finds credit worthy can be

accepted but if the whole of the testimony of the witness gets discredited, the evidence is required to be discarded.

Here in the instant case, as has been noticed above, that the case initially which had been made by the complainant is that both the persons had put forth the demand. However, P.W.7 in his evidence has testified that only this appellant had made demand. The witness on account of this fact and also for other reason has been declared hostile but that piece of evidence where the witness has testified about the demand being made by this appellant gets corroboration from his earlier statement made in the complaint (Ext.11). Therefore, that part of the evidence of P.W.7 can certainly be said to be credit worthy and is acceptable.

Thus, I do find that the prosecution has been able to prove the case beyond any reasonable doubt that both the appellants had made demand of illegal gratification which when tendered was accepted by both of them and then it was recovered from both of them and thereby the trial court has rightly convicted the appellant for the offence under Section 7 read with section 120(B) of the Indian Penal Code as well as Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, though both the offences seem to have been committed in single transaction but still in view of the decision rendered in a case of ***State represented by Inspector of Police, Pudukottai, Tamil Nadu vs. A. Parthivan [(2007) 1 SCC (Cr.) 520]*** one can be convicted for the offence under Section 7 as well as under Section 13(2)i read with Section 13(1)(d) of the Prevention of Corruption Act, even if the act was committed in single transaction.

It has been held that every acceptance of illegal gratification whether preceded by a demand or not would be covered by Section 7 of the Prevention of Corruption Act but if the acceptance of illegal gratification is in pursuance of a demand by the public servant, then it would also fall under Section 13(1)(d) of the Prevention of Corruption Act. However, it has been held that as the offence is one

which falls under two different sections providing different punishments, the offender should not be punished with more severe punishment than the court could award the person by any one of the two offences.

It be noticed that minimum punishment under Section 7 is for six months and the minimum punishment under Section 13(1)(d) is for one year. Keeping in view the minimum sentence prescribed under the aforesaid provision and also the fact that the appellants have been facing rigour of the trial since 2002, it would be appropriate for the ends of justice to sentence each of the appellants for six month for the offence under Section 7 of the Prevention of Corruption Act read with Section 120(B) of the Indian Penal Code and for one year for the offence under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act without any modification with respect to sentence of fine imposed by the trial court for the said offences.

Accordingly, with the modification on the point of sentence, these two appeals stand dismissed.

(R.R. Prasad, J.)

Jharkhand High Court, Ranchi
The 13th March, 2014,
N.Dev/N.A.F.R